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## Unilateralism in international law: Implications of the inclusion of emissions from aviation in the EU ETS

Jacques Hartmann\*

### 1. Introduction

The 1997 Kyoto Protocol deferred negotiations on emissions from aviation to the International Civil Aviation Organization (ICAO).<sup>1</sup> Also within this specialised body, agreement on how to deal with emissions from aviation has been difficult to reach.<sup>2</sup> Frustrated by the lack of progress, the European Union (EU) decided to act unilaterally to reduce emission from aviation, by including aviation within its Emission Trading System (ETS). Initially, the EU set out to include in the ETS emissions from all major aircraft flying to or from European airports, even when these fly over the high seas or foreign territory.<sup>3</sup> Many States, however, viewed the EU's initiative as a unilateral act in violation of their sovereignty. The EU has since suspended the application of the ETS to foreign aircraft.<sup>4</sup> Even so, this incident raises important questions concerning the legality of unilateral acts under international law. This note considers when and how a State or a regional organisation may legitimately take unilateral measures to protect the environment. The note will not consider the legality of including foreign aircraft with-

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<sup>1</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (1998), art 2(2).

<sup>2</sup> Cf European Federation for Transport and Environment, *Grounded: How ICAO failed to tackle aviation and climate change and what should happen now* (September–October 2010).

<sup>3</sup> Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emissions allowance trading within the Community [2009] OJ L8/3.

<sup>4</sup> European Commission, 'Stopping the Clock of ETS and Aviation Emissions Following Last Week's International Civil Aviation Organisation (ICAO) Council' MEMO/12/854 (12 November 2012).



in the ETS, which has been dealt with elsewhere.<sup>5</sup> Instead, it will focus on the legality and importance of unilateral acts for the development of international law.

## 2. Terminology

Before delving into the matter of the legality of unilateral acts in international law, it is necessary to say a few words of clarification about the term ‘unilateral act.’ In international law, this term is often used to refer to formal declarations formulated by a State with the intent to produce obligations under international law.<sup>6</sup> Such declarations generally fall into two categories. The first category concerns declarations that have an explicit legal consequence, such as an objection or a protest.<sup>7</sup> The other category has no specific recipient and its legal consequences are open to interpretation.<sup>8</sup> This note, however, concerns a third type of unilateral act, i.e. cases in which a State acts alone without coordinating with other States that may be impacted by its action. The term unilateral act (or action) is here used to refer to cases when States choose to act alone in addressing a particular global or regional challenge, rather than participating in collective action. And while unilateralism in international law may take many forms, this note mainly considers the exercise of legislative jurisdiction.

## 3. Unilateralism

The word ‘unilateralism’ has a strong negative connotation, and is used almost as a synonym for illegality.<sup>9</sup> But unilateral acts are not un-

<sup>5</sup> See J Hartmann, ‘A Battle for the Skies: Applying the European Emissions Trading System to International Aviation’ (2013) 82 *Nordic J Intl L* 187.

<sup>6</sup> Cf International Law Commission, ‘Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereon’ (2006) *YB Intl L Commission* vol II 370.

<sup>7</sup> See e.g. Vienna Convention on the Law of Treaties (1969) art 21.

<sup>8</sup> The best known example is the case of *Nuclear Tests (Australia v France; New Zealand v France)* [1974] *ICJ Rep* 457 paras 46 and 49.

<sup>9</sup> D Bodansky, ‘What’s so Bad About Unilateral Action to Protect the Environment?’ (2000) 11 *Eur J Intl L* 339.



lawful *per se*. The adjective ‘unilateral’ simply indicates that a State is acting alone, rather than in concert with others. Whether a State acts alone or in concert says nothing about the legitimacy of its actions. An illegitimate action by a State does not, for example, become legitimate simply because it is carried out with others. What matters is not whether States act alone or in concert, but whether the act in question respects the rights of other States.

The EU decision to include emissions from foreign aircraft within the ETS was widely condemned as a unilateral act.<sup>10</sup> But strictly speaking the EU does not act unilaterally. The EU is, after all, a union of 28 States.<sup>11</sup> Moreover, the ETS has been joined by three non-EU Member States, namely Iceland, Liechtenstein and Norway.<sup>12</sup> Thus the heart of the matter was not whether the EU was acting alone or in concert with others, but rather concerned its exercise of legislative jurisdiction, i.e. its competence to regulate emissions taking place outside of the territory of EU Member States. In other words, at the heart of this controversy is the question of when and how a State or international organisation can legitimately regulate events beyond its territory.

### *3.1. Examples of Unilateralism*

Unilateral acts by States are far from uncommon.<sup>13</sup> In fact, States take unilateral measures all the time, and some of these measures even contribute to the development of international law. There are so many examples to choose from that one hardly knows where to start, but the classical example is the 1945 Truman proclamation.

<sup>10</sup> See e.g. Joint Statement Between the Civil Aviation Administration of the People’s Republic of China and the Ministry of Transport of The Russian Federation on European Union’s Inclusion of Aviation into European Union Emission Trading Scheme (27 September 2011).

<sup>11</sup> Art 47 of the Treaty on European Union (2008) (previously art 281 of the Treaty Establishing the European Community (2002)) states that ‘The Union shall have legal personality’, which has been interpreted to mean international legal personality. See case 22/70 *Commission v Council* [1971] ECR 263.

<sup>12</sup> Decision of the EEA Joint Committee no 146/2007 of 26 October 2007 amending Annex XX (Environment) to the EEA Agreement.

<sup>13</sup> P Sands, ‘Unilateralism’, Values, and International Law’ (2000) 11 *Eur J Intl L* 291.

In 1945 international law only allowed States to claim a narrow belt of coastal water stretching three nautical miles from the shore. This limitation was widely accepted and the belt of water was known as the territorial sea. Beyond three nautical miles laid the high seas, over which no State could claim any exclusive rights. Driven by their increasing interest in oil, much of which was beyond the territorial sea, in 1945 the United States laid claim to the continental shelf and the natural resources of the subsoil and sea bed beneath the high seas, far beyond three nautical miles.<sup>14</sup> The Truman proclamation was followed by similar claims by other States and soon came to be seen as the starting point of the law giving coastal States an exclusive right to their continental shelf.<sup>15</sup> In other words, an important part of the law of the sea was instigated by a unilateral act by the United States.

Another prominent example of a unilateral act transforming international law was Canada's extensive claim of legislative jurisdiction over arctic waters. In 1970 Canada claimed competence to regulate environmental issues 100 nautical miles from its shore.<sup>16</sup> The act was clearly inconsistent with pre-existing international law.<sup>17</sup> Crucially, however, only the United States objected, whereas most other States accepted Canada's assertion of jurisdiction and its unilateral act was regarded as an important factor in changing the law. Today, the United Nations Convention on the Law of the Sea accords coastal States the right to legislate and enforce rules on marine pollution in ice-covered areas up to 200 nautical miles from their coast.<sup>18</sup>

Both acts are examples of unilateral measures leading to developments in the law of the sea. Byers suggest that these changes were accepted because they were relatively limited in scope and apparently rea-

<sup>14</sup> US Proclamation 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (28 September 1945).

<sup>15</sup> *North Sea Continental Shelf case (Federal Republic of Germany v Denmark/Netherlands)* [1969] ICJ Rep 3 para. 47. See also DR Rothwell, T Stephens, *The International Law of the Sea* (Hart Publishing 2010) 195.

<sup>16</sup> By enacting the 1970 Arctic Water Pollution Prevention Act. See generally RB Bilder, 'The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea' (1970) 69 *Michigan L Rev* 1.

<sup>17</sup> M Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (CUP 1999) 93.

<sup>18</sup> The United Nations Convention of the Law of the Sea (1982), art 234. See also art 220.



sonable.<sup>19</sup> Whatever the reason for their acceptance, these examples are far from unique to the law of the sea. The importance of unilateral measures for preventing international environmental injury has, for example, long attracted the attention of scholars.<sup>20</sup> Bodansky emphasises how unilateral acts helped catalyse developments in various areas of international environmental law.<sup>21</sup> Today, international environmental law textbooks typically devote several pages, if not an entire section, to the role of unilateral measures for the development of the law.<sup>22</sup> The seminal example is the Pacific Fur Seal Arbitration of 1893, where the United States' unilateral action to protect seals in the Bering Sea *inter alia* led to recognition of the need for conservation to prevent overexploitation and decline in hunted species.<sup>23</sup>

Again, the importance of unilateralism is not unique to international environmental law. Almost any area of international law has been shaped by unilateralism. The introduction of many new technologies, for example, has led to the adoption of unilateral measures. The first State to exercise legislative jurisdiction over an aircraft flying over the high seas was acting unilaterally, as was the first State to fly a satellite over the territory of another State. Changes in values may likewise lead to unilateralism. The first State to stop slave trade was acting unilaterally, as was the first State to prohibit piracy. While some unilateral acts have been met with protest, others have been readily accepted. This naturally raises the question: when may a State act unilaterally and when are unilateral acts likely to be accepted by other States?

#### 4. *Legitimate Unilateral Measures*

In international law, the notion of legitimacy is often related to the

<sup>19</sup> Byers (n 17) 95.

<sup>20</sup> See e.g. RB Bilder, 'The Role of Unilateral State Action in Preventing International Environmental Injury' (1981) 14 *Vanderbilt J Transnational L* 51.

<sup>21</sup> International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969). Bodansky (n 9) 334.

<sup>22</sup> See e.g. P Sands and J Peel, *Principles of International Environmental Law* (CUP 2012) 399.

<sup>23</sup> P Birnie, A Boyle, C Redgwell, *International Law and the Environment* (3 edn, OUP 2009) 707.



acceptance of an act by other States. When unilateral acts are accepted, they may lead to a change in the law. But not every State's exercise of sovereign rights that may have effect in the territory of another is necessarily contrary to international law. Indeed, unilateral acts interfering with the rights of other States are far from uncommon. In an increasingly globalised world, where the effects of actions carried out in one State may easily reach and be felt in others, jurisdictional conflict is almost unavoidable. Traditionally, the exercise of legislative jurisdiction is only considered contrary to international law if it represents a usurpation of the sovereign powers of a third State.<sup>24</sup>

#### 4.1. *When May a State Act Unilaterally?*

The world is divided into jurisdictional spheres.<sup>25</sup> The most important division is that based on the acceptance that the powers of a State to legislate, adjudicate and enforce its rules generally end at the national border. Each State is, in other words, delegated a portion of the globe within which it has the right, to the exclusion of any other State, to exercise the functions of a State.<sup>26</sup>

This neat division works well in theory, but is not always easy to apply in practice.<sup>27</sup> The continued reliance on territorial factors in determining the scope of a State's legislative jurisdiction has been increasingly called into question. This is due primarily to the growing complexity and diffusion of transactions and events that trigger jurisdictional inquiry.<sup>28</sup> Even so, territoriality is still the most common legal basis for the exercise of legislative jurisdiction.<sup>29</sup>

<sup>24</sup> M Akehurst, 'Jurisdiction in International Law' (1972) 46 *British Ybk Intl L* 145, 146–147. See also FA Mann, 'The Doctrine of International Jurisdiction Revisited After Twenty Years' (1984) 186 *Recueil des Cours de l'Académie de Droit International* 20.

<sup>25</sup> Cf. FA Mann, 'The Doctrine of Jurisdiction in International Law' (1964) 111 *Recueil des Cours de l'Académie de Droit International* 30.

<sup>26</sup> As famously expressed by Max Huber in the *Island of Palmas Arbitration (Netherlands v USA)* (1928) 2 *RIAA* 829, 838.

<sup>27</sup> The classical example of a dispute is *The Case of the SS 'Lotus' (France v Turkey)* PCIJ Rep Series A No 10.

<sup>28</sup> H Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 *American J Comparative L* 631, 632.

<sup>29</sup> As stated by the UK Home secretary: 'As a general rule the UK courts only have jurisdiction in respect of offences committed within the UK but there are a number of

The jurisdictional sphere of a State is not, however, impenetrable nor is it entirely territorial. In addition to territory, a State may legislate for extraterritorial events whenever there is a clear connecting factor between itself and the conduct that it seeks to regulate.<sup>30</sup> Three additional connecting factors are generally accepted in international law: the principle of personality (both active and passive), the protective principle and the universal principle.<sup>31</sup>

The requirement of a connecting factor is supported by State practice, as argued, for example, by the United Kingdom and the Netherlands in their intervention in *Esther Kiobel et al v Royal Dutch Shell Petroleum Company* before the US Supreme Court:

‘... it is axiomatic that the exercise of civil jurisdiction by a State will always depend on ‘there being between the subject matter and the State exercising jurisdiction a sufficiently close connection to justify that State in regulating the matter and perhaps also to override any competing rights of other States.’<sup>32</sup>

Where there is a strong connection, the exercise of legislative jurisdiction is legitimate and should not raise the objections of other States. This is so regardless of whether the act is unilateral or not. In practice, however, it is not always easy to establish a clear threshold for when a State can regulate extraterritorial conduct without being met by protest.

This is particularly noticeable in the dispute over the EU ETS. Several States objected to the inclusion of foreign aircraft within the system as a violation of their sovereignty. In stark contrast, the European Court of Justice found that the EU was merely exercising legislative jurisdiction based on the principle of territoriality.<sup>33</sup> There was, in other words, no agreement on a very basic question: does regulation of aircraft emissions carried out outside of the territory of the regulating State satisfy

exceptions.’ For the exceptions, see United Kingdom Materials of International Law (2006) 77 British Ybk Intl L 751.

<sup>30</sup> C Staker, ‘Jurisdiction’ in M Evans (ed), *International Law* (4th edn, OUP 2014) 315.

<sup>31</sup> *ibid.*

<sup>32</sup> Reproduced in United Kingdom Materials of International Law (2012) 83 British Ybk Intl L 463.

<sup>33</sup> Case C-366/10, *Air Transport Association of America and Others v Secretary of State for Energy and Climate* [2011] ECR I-13755, para 125.





the territorial principle of jurisdiction? Disagreement on this seemingly basic question indicates that the doctrine of jurisdiction conceals a significant amount of uncertainty.

This uncertainty is also reflected in the literature. Scholars have long debated various ways of assessing the legislative limits of States' actions.<sup>34</sup> Some have suggested that all forms of extraterritorial legislative jurisdiction are against international law.<sup>35</sup> However, this assertion is contrary to State practice. Most States, for example, prohibit anticompetitive behaviour that has economic effects within their territory, or even behaviour that is intended to have such an effect.<sup>36</sup> Others have suggested that international law only imposes restrictions in the criminal sphere.<sup>37</sup> This proposition is, again, contradicted by State practice, such as the UK Criminal Justice Act 1988, whereby the offence of torture can be tried by English courts, regardless of the nationality of the offender and of where the act took place.<sup>38</sup> The 1988 Act is not the only example of States extending the reach of their criminal law beyond their borders, and indeed several States have adopted similar measures.<sup>39</sup> Views on this issue are far and wide apart, although many scholars agree on the requirement of a 'connecting' factor,<sup>40</sup> whereby a State that is not affected by an activity has no right to regulate it.

The requirement of a connecting factor reflects the traditional view that the doctrine of jurisdiction serves to limit friction and promote orderly relations among States.<sup>41</sup> This makes good sense, but one could

<sup>34</sup> For a longer discussion, see Hartmann (n 5) 209-212.

<sup>35</sup> Cf Akehurst (n 24) 181 and citations therein. See also BF Havel, JQ Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme' (2012) 37 *Air and Space L* 3.

<sup>36</sup> Cf. MM Dabbah, *International and Comparative Competition Law* (CUP 2010) 418 ff.

<sup>37</sup> *ibid* 177; G Fitzmaurice, 'The General Principles of International Law' (1957) 92 *Recueil des Cours de l'Académie de Droit International* 218; P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, Routledge 1997) 110.

<sup>38</sup> To date, there has only been one successful prosecution for torture under section 134 of the Criminal Justice Act 1988. *R v Zardad* [2007] EWCA Crim 279.

<sup>39</sup> See Report of the International Bar Association, 'Legal Practice Division Task Force on Extraterritorial Jurisdiction' (February 2009) pp. 133-200.

<sup>40</sup> The obvious exception being conduct subject to universal jurisdiction.

<sup>41</sup> Cf R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1995) 56.



question its cogency in relation to global environmental threats, where no one State is principally affected and therefore no State may have a legitimate base on which to act – global warming being the preminent example.

#### *4.2. When Are Unilateral Acts Likely to Be Accepted?*

Sometimes competing jurisdictional claims become the object of a dispute between the legislating State and those objecting to the exercise of jurisdiction. While such disputes may be resolved by international tribunals, more frequently they are resolved by acquiescence or agreement between the involved States.

Importantly, agreement may be reached even where the unilateral act was contrary to international law. In fact, in most cases a dispute arises exactly because a unilateral act is perceived to be unlawful. Given the uncertainty surrounding the doctrine of jurisdiction, a State acting unilaterally may not always know in advance how its act will be received. In some case the response might be obvious. This especially so when unilateral acts are precipitated by lack of consensus in international negotiations, such as those on emissions from aviation, which have so far achieved little in the way of concrete results.

Unilateralism can have a destabilising effect on international relations. When facing the prospect of protest, it is up to each State to weigh the benefits of unilateral action against the costs of that action to the stability of the international law system, and to their national interest.<sup>42</sup> In this connection, Bodansky suggests several factors that should be taken into account, such as the necessity of the action; the effect on other States; whether a State acts to protect its own environment; and whether the unilateral action could turn into a general rule of international law.<sup>43</sup>

These all are reasonable considerations, and reasonableness itself has been regarded as an important element in assessing whether a State may exercise jurisdiction.<sup>44</sup> This does not mean that a State may exercise

<sup>42</sup> Cf. Bodansky (n 9) 346.

<sup>43</sup> *ibid* 347.

<sup>44</sup> See e.g. *Third Restatement of the Foreign Relations Law of the United States* § 402 (1986). C Ryngaert, *Jurisdiction in International Law* (OUP 2008) 36.

legislative jurisdiction when it is objectively reasonable for it to do so, but rather when it can point to a rule of international law that allows it to do so. These rules may be based on reasonable claims, but it is the practice of States that creates the rule, not the reasonableness of their actions. Thus, even where the exercise of jurisdiction may seem reasonable, it may still be met by protest.

Emissions from aviation are a case in point. The latest report of the Intergovernmental Panel on Climate Change notes how the use of market policies to reduce emissions from aviation is ‘compelling’ to address the rapidly raising emission in this sector.<sup>45</sup> The EU has vigorously pursued multilateral avenues to address this problem, and eventually chose unilateralism as sub-optimal approach, rather than leaving this rapidly growing source of emissions completely unregulated.<sup>46</sup> Yet, its actions were still met by strong protests.

### 5. *An Obligation to Cooperate?*

When assessing the legality of a unilateral act, international tribunals will often refer to the obligation to cooperate.<sup>47</sup> This obligation was emphasised by the World Trade Organization’s (WTO) Appellate Body in the *Shrimp-Turtle* cases.<sup>48</sup> The first case concerned a dispute engendered by the United States’ prohibition of the import of shrimp that had not been caught in compliance with domestic rules protecting endangered sea turtles. Even though the US famously lost this case because its acts were deemed to be discriminatory, the Appellate Body found that there was a sufficient nexus between the migratory and en-

<sup>45</sup> IPCC, *Climate Change 2014: Mitigation of Climate Change. Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014) 63.

<sup>46</sup> L Rajamani, ‘European Union, Climate Action Hero?’ *The Indian Express* (3 August 2012).

<sup>47</sup> See e.g. ITLOS, *Mox Plant Case (Ireland v United Kingdom)* (Provisional Measure Order 3 December 2001) paras 82. See also the separate opinion of Judge Rudiger Wolfrum in the case concerning *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Order 8 October 2003) para 92.

<sup>48</sup> WTO *United States: Import Prohibition of Certain Shrimp and Shrimp Products—Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R (22 October 2001) WT/DS58/AB/RW.



dangered marine populations involved and the United States.<sup>49</sup>

However, in 2001, the WTO Appellate Body introduced a qualifier concerning its reasoning on the legitimacy of the unilateral act to protect exhaustible natural resources. In this second case, Malaysia argued that the United States had not complied with the original decision, where the Appellate Body had noted the US' failure to engage WTO Members exporting shrimp in 'serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles.'<sup>50</sup> In Malaysia's view, the Appellate Body's reasoning entailed that unilateral measures were to be regarded as unjustified whenever multilateral avenues had not first been exhausted. The Appellate Body did not reject this argument, but found that, in light of the 'serious, good faith efforts' to negotiate an international agreement, the disputed law no longer constituted a means of unjustifiable or arbitrary discrimination.<sup>51</sup> Thus, at least within the WTO regime, the legitimacy of unilateral acts seems to require prior good faith efforts to reach a multilateral agreement.

In case of the inclusion of emissions from aviation in the EU ETS, it can hardly be disputed that the EU has sought to follow a multilateral approach. After the ICAO Council meeting in November 2012, the EU deferred the application of the ETS to foreign operators for one year, as a 'gesture of good faith.'<sup>52</sup> Its Commissioner for Climate Action warned that if the ICAO negotiations did not deliver, the EU would revert to its original position.<sup>53</sup> However, after the 2013 ICAO decision to produce a proposal for a global market-based measure for aircraft emissions to be implemented by 2020,<sup>54</sup> the EU ETS was amended so as to cover only emissions from flights within the European Economic Area.<sup>55</sup> Still, the

<sup>49</sup> *ibid* para. 133.

<sup>50</sup> *ibid* para. 166.

<sup>51</sup> *ibid* para. 134.

<sup>52</sup> European Commission (n 4).

<sup>53</sup> *ibid*.

<sup>54</sup> ICAO Press release, 'Dramatic MBM Agreement and Solid Global Plan Endorsements Help Deliver Landmark ICAO 38th Assembly' (4 October 2013).

<sup>55</sup> Regulation (EU) no 421/2014 of The European Parliament and of The Council of 16 April 2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions [2014] OJ L129/1.

amendment requires the EU Commission to report to the European Parliament and Council on the outcome of the ICAO process and propose measures, as appropriate.<sup>56</sup>

It is difficult to tell whether the EU ‘wait and see’ approach was motivated by a perceived legal obligation to cooperate in good faith with other States, or by mere *realpolitik*. The EU was probably driven by both.<sup>57</sup> The EU ETS amendment explicitly states that the ‘Union is endeavouring to secure a future international agreement to control greenhouse gas emissions from aviation’ and that in order to ensure this objective ‘it is appropriate to take account of developments’ in international fora.<sup>58</sup> Thus, if there is a general obligation to pursue multilateral avenues, the EU cannot be accused of having failed to comply with it.

The pursuit of multilateral avenues may not, however, be an option in especially urgent or problematic circumstances, such as those of the 1967 British bombing of the *Torrey Canyon* to protect its coastal waters from oil spill. Many unilateral acts that have led to changes in international law have, moreover, been accepted even where there were no prior attempts at international negotiations had been made, such as the Truman proclamation and the Canadian protection of arctic waters. In relation to environmental law, some have suggested that there is a customary obligation to cooperate with other States whose interests may be affected.<sup>59</sup> The WTO Appellate Bodies’ reasoning in the *Shrimp-Turtle* cases seem to suggest that this requirement always applies, regardless of motive. Arguably, however, a distinction should be made between unilateral acts taken for an altruistic motive such as the pursuit of global public goods, as opposed to narrow national interests, although such a distinction may be difficult to make.

## 6. Conclusion

This note has considered when and how a State or a regional organisation may legitimately take unilateral measures to protect the envi-

<sup>56</sup> *ibid* para. 14.

<sup>57</sup> Cf A Vihma, A van Asselt, ‘The Conflict Over Aviation Emissions’ [2014] FIIA Briefing Paper 6.

<sup>58</sup> Regulation (EU) no 421/2014 (n 55).

<sup>59</sup> See Judge Rudiger Wolfrum (n 47).



ronment. While the term ‘unilateralism’ is often used almost synonymously with illegality, it is not the unilateral nature of an act that determines its legitimacy. Instead, the legitimacy of a unilateral act depends on a series of circumstances and, in some cases, on other States’ reaction.

Where a unilateral act does not affect the rights of other States, it will almost always be legitimate. No State, for example, has complained about the inclusion of emissions from intra-European flights within the ETS. But where a unilateral act affects other States, they might protest. In those cases, the State perceived to be acting unilaterally must show that it has respected the rights of other States. This may be a rather straightforward matter when the State can point to a rule of international law that allows it to act. Reference to the principle of territorial jurisdiction will not, however, necessarily stop the controversy. Firstly, because the application of the principle of territorial jurisdiction does not always lead to clear-cut outcomes. Secondly, because protests might not always be made in good faith.

Prior good faith efforts to negotiate an international agreement may help prevent an international dispute, but they are not always necessary. In this regard, a distinction should be drawn between unilateral acts designed to address a situation in lack of a specific treaty; and unilateral acts designed to pressurise other States into raising environmental standards within an existing treaty regime. In the first kind of instances, unilateral action may lead to the negotiation of a new treaty or the formation of a rule of customary international law. The EU’s inclusion of aviation emissions within the ETS clearly falls within this first category, as at present there is no treaty that specifically regulates emissions from aircraft. In the second kind of instances, instead, the matter is not the negotiation of a new treaty or the formation of customary international law, but the interpretation of extant treaty law. The *Shrimp-Turtle* cases clearly fall within this second category, as WTO law contains detailed rules on free trade, allowing exceptions for the protection of the environment. The cases focused on the interpretation to be given to such exceptions. In sum, the dispute concerning the inclusion of aviation emissions in the EU ETS addressed an altogether different matter than that under consideration in the *Shrimp-Turtle* cases.

Another consideration that is of interest to answer the questions under consideration here is that, even in cases where a State cannot

point to a rule of international law that allows it to act, its action might still be accepted. Indeed, sometimes States have to break the rules to change international law. It might even be argued that in some cases law-breaking is an essential method of law-making. Unilateral acts can lead to developments of both treaty and customary international law. A single unilateral act does not in itself establish a new norm of customary international law, although, if accepted by other States, it might provide evidence of relevant State practice. In most cases when States act unilaterally, their acts are to be interpreted as an 'offer' to change the law.<sup>60</sup> Seen in this light, the Truman proclamation was an offer for a new way of dealing with ownership of seabed resources, while the inclusion of aviation emissions in the EU ETS may be seen as an offer for a new way of dealing with this specific emissions source.

To conclude, while some unilateral acts may be at odds with extant international law, lawlessness is not in itself an impeding factor to the establishment of a new legal paradigm. Indeed, the traditional doctrine of jurisdiction seems to be increasingly at odds with the need to tackle global environmental problems, such as climate change. At present, the requirement of a link between the State legislating and the matter that it seeks to regulate often leaves multilateralism as the only solution to global problems. While multilateralism is the preferable option, however, the alternative inaction might not be. In other words, in the face of continued inaction, unilateralism may be the only way forward. When a State acts unilaterally without engendering protests, it may succeed in prompting a change in the law, as happened with the Truman proclamation. It remains to be seen whether, with hindsight, the EU's inclusion of emissions from aviation in the ETS will turn out to be another Truman moment.

<sup>60</sup> AV Lowe, *International Law* (OUP 2007) 39.